Supreme Court, U.S.
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82-1168

No.

IN THE

Supreme Court of the United States

October Term, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE," a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. PLATZMAN
Attorney for Petitioners
40 Grove Street, P. O. Box 329
Middletown, NY 10940
(914) 343-4281

Questions Presented.

1. Whether it was a violation of due process of law by withholding from the jury all of the testimony relating to respondents' conduct in attempting to tamper with petitioners' principal witness.

2. Whether the Court below violated petitioners' right to a trial by jury by withholding from the jury all of the testimony relating to respondents' attempt to tamper with petitioners' principal witness.

3. Whether it was a violation of due process of law to conceal from the jury the respondents' acts which were violative of §215.10 of the Penal Law of the State of New York.

4. Whether it was a violation of petitioners' right to a trial by jury to conceal from the jury the respondents' acts which were violative of §215.10 of the Penal Law of the State of New York.

5. Whether it was a violation of due process of law to conceal from the jury the testimony indicating respondents' attempt to tamper with the testimony of petitioners' principal witness.

6. Whether it was violative of petitioners' right to a trial by jury to conceal from the jury the testimony indicating respondents' attempt to tamper with the testimony of petitioners' principal witness.

7. Whether it was a violation of due process of law to refuse to order a mistrial when it was disclosed that respondents had attempted to tamper with the testimony of petitioners' principal witness, and that such conduct was highly objectionable and improper, and then to preclude petitioner from disclosing to the jury all of the testimony taken revealing such incident.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982.

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, Frank Anthony Monaco, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "John Doe," a partnership, said name "John Doe" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK—APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

PETITION FOR WRIT OF CERTIORARI.

The petitioners, Frank Angelo Monaco, an infant under the age of 14 years, by his parent and natural guardian, Frank Anthony Monaco, Diana Lynn Monaco and Frank Anthony Monaco, pray that a writ of certiorari be issued to review the opinion and judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the Clerk's office on the seventh day of June, 1982.

Opinions Below.

No opinion was rendered in this matter by either the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, or by the Court of Appeals of the State of New York.

Jurisdiction.

Jurisdiction is conferred on this Court by Title 28, U. S. Code, §1254. The issues herein were finally determined by the order of the Court of Appeals of the State of New York dated October 19, 1982, which refused to grant a review of the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department made June 7, 1982. The decision of the Appellate Division above referred to and which is sought to be reviewed herein was filed on June 7, 1982.

Constitutional and Statutory Provisions Involved.

The case involves the First Section of the 14th Amendment of the Constitution of the United States which provides as follows:

> "All persons born and naturalized in the United States and subject to the jurisdiction thereof, are

> citizens of the United States and of the state in which they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor doing to any person within its jurisdiction the equal protection of the laws."

The case also involves §215.10 of the Penal Law of the State of New York which reads as follows:

> "A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person."

Statement of the Case.

During the course of the trial petitioners sought to have the Court declare a mistrial for the reasons set forth below, but which essentially concerned respondents' attempts during the course of the trial to tamper with the testimony of petitioners' principal witness. Following the denial, testimony concerning the events relating to this attempt to tamper was taken *in camera* outside the presence and hearing of the jury. The refusal on the part of the Court to declare a mistrial was based upon the economics of the problem of a retrial. It was concerned with the "expense to the parties" (p. 1307). After refusing a mistrial,

the Court then precluded the petitioners from allowing the jury to hear all of the evidence which related to this attempt. The refusal to allow the jury to hear what happened and make its own judgment concerning these events was serious, particularly in an action that was as hotly contested as the one at bar. Although the Court recognized the seriousness of what had taken place, and its possible impact on the jury's deliberations, it not only refused a mistrial, but refused to let the jury hear what had happened. The Court agreed that the acts were sufficiently serious so that "disciplinary action may well be in order" (p. 2549).

The matter was appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. That Court affirmed the judgment of the Court below without opinion. Applications were thereafter made to reargue and for leave to appeal to the Court of Appeals. Those applications were denied both by the Appellate Division and the Court of Appeals. The latter denial was made by order dated October 19, 1982.

Statement of Facts.

The plaintiff, Diane Monaco, entered Horton Memorial Hospital on July 15, 1974, at 3:30 a.m. The infant plaintiff, Frankie Monaco, was ultimately delivered by Cesarean section at 1:44 p.m. on the same date. Dr. Ira Rubenstein, Dr. Fred Levinson and Dr. Fred Feiner were the obstetricians who participated in the prenatal care and the delivery. Defendant Rohatgi administered DPT vaccinations to the infant plaintiff on September 14, October 14, and November 14, 1974. After the third DPT vaccination, the infant developed seizures and encephalopathy, and became blind. He was later treated for these problems

by Dr. Arnold Gold at Columbia Presbyterian Medical Center.

Plaintiffs alleged, and the testimony showed, that the infant plaintiff became blind and suffered seizures, in part, as a result of a contraindicated third injection of DPT vaccine. The injection was contraindicated because of the presence of a prolonged high fever after each of the first two injections, and because of the presence of colic and an inward deviation of one eye after the second injection. The infant also sustained brain damage because the defendant obstetricians performed a contraindicated amniotomy and unduly delayed the performance of a Cesarean section in light of the presence of cephalopelvic disproportion, failure of the infant to progress down the birth canal, the presence of meconium fluid, and dramatic changes in the fetal heart beat rate. This caused hypoxia, which contributed to the brain damage.

The action was hotly contested. The trial took approximately seven weeks. Petitioners' case contained a vast amount of testimony pointing to neglect, bad judgment, violation of accepted practice and similar facts which more than justified a judgment for the petitioners. A brief summary of what was presented is attached hereto and marked Appendix A.

The respondents refuted the petitioners' claims. Hence, a critical aspect of the case in determining success or failure with respect to either party was dependent upon the credibility of witnesses, belief of expert testimony and other conduct which might point to a recognition of where the truth rested. In this regard, the exclusion of the testimony which the petitioners sought to present to the jury was extremely serious, and was violative of the petitioners' rights to a fair trial by jury and to the conduct of

the trial in accordance with the principle of due process of law.

Petitioners' principal expert witness was a Dr. Neil Sherman. Prior to the completion of Dr. Sherman's testimony, the Court recessed for the day. When the Court reconvened the next day, plaintiffs' attorneys moved for a mistrial because of the events that transpired during the Court's recess (R. 1237, 1238). Testimony was taken concerning the events during this period. *but outside of the presence of the jury.* Specifically, plaintiffs' counsel learned through Dr. Sherman that someone called his supervisor, a Dr. Robert Morris, at New York University Hospital Medical Center (hereinafter referred to as "University Hospital" or "the hospital"), where Dr. Sherman was affiliated, in an attempt to intimidate him.

Mr. Ryan, attorney for the obstetricians, admitted that he called Dr. Morris and discussed the details of Dr. Sherman's testimony with him, even though he knew that his testimony was not yet complete. Mr. Ryan conceded that he knew that Dr. Morris was a supervisor in the obstetrical department, and that one of his clients, the defendant, Dr. Feiner, also called Dr. Morris and discussed with him the details of the case and Dr. Sherman's testimony (R. 1241, 1243).

The Court conducted an *in camera* hearing regarding these attempts to influence Dr. Sherman's testimony. Dr. Sherman testified that Dr. Morris was the Director of Obstetrics and spoke to him with a raised voice and a belligerent, critical attitude. Dr. Morris stated that he [Sherman] used "poor judgment in not consulting with him before testifying," and that he "would bring this fact

to the attention of Dr. Gordon Watkins Douglas," Chairman of the Department at the hospital. Morris told Sherman that the testimony "hung two doctors and is going to cost them a boodle." Sherman clearly felt that his affiliation with the hospital and his hospital privileges would be jeopardized (R. 1258); that there would be "flak" and potential jeopardy (R. 1252, 1277).

Still outside the presence of the jury, Dr. Feiner then testified that he called Dr. Morris at about 9 a.m. on Wednesday, January 24th, after speaking to Mr. Ryan. Dr. Feiner told Morris that he would not "involve him" [Morris] or two other doctors he spoke with at the hospital, because he was "concerned about the implications of *revealing their names.*" Feiner testified that he discussed Dr. Sherman's testimony and his fee with one of the unidentified doctors he spoke with. Dr. Feiner told Mr. Ryan about his conversation with one of these *unidentified doctors* and asked his wife to call another doctor on the hospital staff without telling Mr. Ryan about this. Dr. Feiner then spoke to this other *unidentified doctor* and discussed Dr. Sherman's fee. According to Dr. Feiner, this second unidentified doctor responded to what Dr. Feiner said by calling Sherman something like a "son of a bitch" (R. 1279, 1293).

After speaking to the *two unidentified doctors,* Dr. Feiner called Dr. Morris and told him that the conversation was "off the record, just between us." Dr. Feiner told Dr. Morris that he thought that he and his associates were "being lynched," and that he wanted to find out what kind of man would testify that he and his associates departed from accepted practice. Dr. Feiner also discussed Dr. Sherman's fee with Dr. Morris. Dr. Morris responded by stating that he was sorry that Dr. Douglas was not

available because he felt that he [Morris] was not in a position to "do anything" relative to the testimony, implying that Douglas could do so by stating that "Douglas would be *interested* in the testimony" (R. 1295, 1298). (Italics briefer's.)

After this telephone conversation with Dr. Morris, Dr. Feiner then called Dr. Douglas' office to find out where Douglas was in order to get in touch with him (R. 1299).

To further heighten the mystery and to exacerbate the injury already sustained by what transpired, it appears that Dr. Feiner, as indicated, had spoken to other physicians whom he did not identify and whose names were not revealed because of Dr. Feiner's concern about implicating these other doctors.

The Court denied plaintiffs' application for a mistrial in part to "avoid substantial disruption of the trial" and because of the "expense to the parties" (R. 1307).

After Dr. Feiner and his attorney tampered with Dr. Sherman's testimony, Dr. Sherman when recalled to the stand repeatedly qualified his testimony and diluted the effect of it by stating that he was not speaking for the "standards of the other physicians at University Hospital" (R. 1326, 1335, 1336). Attorney Ryan repeatedly sought these responses by asking what Dr. Sherman "learned about the practices of other doctors" at University Hospital and as to what was the practice of the Director of Obstetrics at University Hospital (R. 1326, 1327, 1377, 1378). The Court, over objection, allowed Dr. Sherman to answer questions about the practice of the Director of Obstetrics (R. 1328).

On cross examination, and after the complained-of attempt at tampering, Dr. Sherman modified his position considerably. He conceded that the failure to do a Ceasarean section after 7:20 or 7:30 did not cause fetal distress as, in his opinion, it had already occurred (R. 1423, 1424). He also "admitted" that a failure to use a fetal monitor did not cause the distress which he claims occurred (R. 1420). Although there were two later incidents of green-tinged fluid, the witness could not say if there were any further incidents of fetal distress (R. 1232, 1233, 1423, 1449, 1450).

Dr. Sherman acknowledged that there was no fetal distress at the time of delivery (R. 1405, 1406). In spite of this watering down of Dr. Sherman's testimony, the Court refused to let the jury hear what had transpired and all of the events relating to the conversations of the respondent Feiner, respondents' attorney, etc., with superiors of Dr. Sherman and the other members of his staff at his hospital.

Both defendant Feiner and his attorney, Mr. Ryan, attempted to and did in fact tamper with Dr. Sherman's testimony.

Both Dr. Feiner and Mr. Ryan called Dr. Morris, Dr. Sherman's superior at University Hospital. Dr. Feiner told Mr. Ryan that he would call Dr. Morris, even though Mr. Ryan had already spoken to Morris. Two other doctors were also spoken to. This was an obvious attempt to exert pressure on Dr. Sherman outside the Court to change or recant his testimony. He was referred to as "a son of a bitch" by one doctor provoked by the respondent Feiner. Dr. Sherman was in fact placed under pressure and was threatened that the matter would be referred to the Chairman of the Department of the hospital. Furthermore, Dr.

Feiner discussed not only the substance of Dr. Sherman's testimony, but also discussed the fee he was charging. He said that Dr. Sherman was trying to "lynch" his associates. Dr. Feiner called not only one, but three physicians on the hospital staff regarding Sherman's testimony as well as his fee. The inferences are strong that Dr. Sherman was to be punished for his testimony against a physician.

Dr. Feiner knew his actions were improper because he told Dr. Morris that the conversation was off the record, and was, because of the implications of the conversation, "just between the two of them." Obviously, Feiner did not want anyone to learn that he had called. Dr. Morris, accordingly, refused to disclose the name of his "informant."

Dr. Feiner clearly tried "to do" something about Sherman's testimony. When Dr. Morris told him that he could not do anything, "but that Dr. Douglas (Chairman of the Department) would be interested," Feiner then promptly tried to communicate with Dr. Douglas.

Finally, the attempts to threaten Dr. Sherman were, in fact, successful. Dr. Sherman stated under oath that he was worried about the repercussions of his testimony. His testimony was clearly affected. He repeatedly stated that he was speaking only for himself and not for the hospital, and that he could not speak for other people in his department. The impact of his testimony was obviously diluted, if not negated. It must have had an adverse effect upon the plaintiffs' case.

The respondents attempted to soften the effect of what had transpired by urging that all that they were trying to

do was to "check" the testimony of Sherman concerning his qualifications. They urged they were not attempting to tamper with or affect the witness' testimony. Of course, in reading the testimony as to what transpired, one can hardly believe that this was a routine and properly conducted investigation as to the honesty of Dr. Sherman and his testimony. The language that was utilized by the parties, the statements that were made, clearly indicate something more than an attempt to verify Dr. Sherman's qualifications. One can hardly believe anything other than that they were exerting pressure on the doctor not to testify or, if he did, that he would have to modify what he had said and what he was going to say. Even if the petitioners were wrong in the interpretation to be placed upon such testimony, it was the *jury* that should make the determination whether this was an innocent investigation concerning Dr. Sherman's qualifications or whether it was an out and out offense, violating every principle of law and the constitutional safeguards relating to a trial by jury. The latter had the right to hear what took place to determine whether there was an attempt to tamper, or whether it was an innocent check upon Dr. Sherman's veracity. To withhold this testimony from the jury was a clear violation of due process of law. It was not for the Court to decide whether the jury should hear what happened. Not only was a new trial denied, but the jury was prevented from hearing the events to make its own decision regarding them.

The respondents' attempt to discredit Dr. Sherman in that he testified that he is "on the faculty of New York University School of Medicine." The criticism is leveled against him because he thereafter was asked whether he had a teaching assignment and he said he did not:

> "I stated I was on the faculty of the medical school * * *."

And then:

> "I did not state that I did [have a teaching assignment] *at present.*" (Italics briefer's.)

The writer is at a loss to understand how this testimony would justify the acts that took place. One has to really stretch one's thinking to agree that tampering with the witness was proper because this made possible the "correction" of the witness' testimony to the effect that he didn't have a *present* teaching assignment. Sheer nonsense!!!

What was said with respect to the respondents' supposed desire to check Dr. Sherman's qualifications applies also to the respondents' claims that they were attempting to ascertain how many deliveries he did have, urging that he had exaggerated the number of deliveries that he took credit for. Even assuming that all of this was true, the conversations that took place don't point to this kind of an "investigation." But if it is true, it was the jury that had to make that decision, and the petitioners should not have been deprived of that right to a trial by jury as to any issue in the case.

Attempts to tamper with the testimony of an adverse witness creates an inference of liability.

> *Hoag vs. Wright,* 174 N. Y. 36, 46;
> *Nowack vs. Metropolitan St. Ry. Co.,* 166 N. Y. 433;
> *People vs. Shilitano,* 218 N. Y. 161.

In the *Hoag* case, *supra,* the Court of Appeals said:

> "Relations which a witness has to the case, or to a party, threats made by him, the fact that a party tried to bribe him, the fabrication, destruction or concealment of evidence and the like, may be shown."

The *Shilitano* case, *supra,* emphasized the doctrine:

> "The action of the defendant's brother and his attorney in dealing with the witnesses is indicative of an effort to coerce witnesses and suppress evidence against the defendant. That such efforts may have some tendency to prove a consciousness of guilt seems to be a fair deduction, and, therefore, they were properly admitted in evidence."

The *Nowack* case, *supra,* held that proof of tampering with a witness could be introduced into evidence against a corporation where the corporation's agent engaged in the act, even though the agent was not expressly authorized to perform the act.

Evidence of the defendant's conduct after the events relating to malpractice in attempting to suppress adverse testimony, by exerting pressure on a witness, is evidence of a consciousness of liability. It may be considered by the jury as an admission by conduct.

If the effort to suppress evidence is admissible against a witness, it should certainly be admissible against a party. Dr. Feiner was clearly acting for himself and his associates.

Additionally, the defendant's conduct was clearly a "bad act" directly relevant to the issues in the trial, and was thus admissible for this reason, if for none other. The Court itself said that disciplinary measures might be appropriate.

Section 215.10 of the Penal Law states as follows:

> "A person is guilty of tampering with a witness when, knowing that a person is or is about to be called as a witness in an action or proceeding, (a) he wrongfully induces or attempts to induce such person to absent himself from, or otherwise to avoid or seek to avoid appearing or testifying at, such action or proceeding, or (b) he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person."

Tampering with a witness is a Class A misdemeanor. It is not necessary that the individual actually succeed in dissuading a witness from appearing at trial to constitute a crime. The conduct prohibited by the statute is broader than that.

> *People vs. Leonard,* 24 Misc. 2d 300, 197 N. Y. S. 2d 209 (1960).

Certainly, there was sufficient evidence for a jury to conclude that Dr. Feiner had attempted to suppress Dr. Sherman's testimony, or that he had made a false statement in an effort to exert pressure on him by his superiors.

It was also admissible against the witness involved for the purpose of impeaching him.

Richardson, Law of Evidence, §493 (1973).

The author of this work pointed out that one of the major methods of impeaching the credibility of an opponent's witness is by:

> "* * * interrogating him on cross-examination concerning any immoral, vicious or criminal act of his life which may affect his character and tend to show that he is not worthy of belief."

Furthermore, the witness may be asked:

> "* * * whether he had previously * * * engaged in a nefarious, though perhaps not criminal, occupation."

He may be interrogated on cross examination to any—

> "* * * criminal act committed by him even though he was never convicted of the crime or even formally charged with it."

Richardson, supra, §498.

Regardless of whether the conduct was "criminal," or constituted an "admission by conduct," it was clearly reprehensible. It should not be condoned even if the overwhelming weight of the evidence were in favor of the party who engaged in this nefarious conduct. It should certainly not be condoned where, as here, the issues were hotly contested. Condoning such actions is tantamount to sanctioning them. It is particularly dangerous in an environment where it is difficult enough for injured parties to obtain

the services of physicians to testify as to malpractice committed by their peers. *McDermott vs. Manhattan Eye, Ear & Nose Hosp.*, 15 N. Y. 2d 20, 27, 255 N. Y. S. 2d 65, 71 (1964).

In any event, it was improper to prevent the plaintiff from enlightening the jury as to all of the events surrounding this incident. The issues in the case were very sharp. Credibility of the witnesses was most important. The conclusion that the juror might reach and the inferences they could draw provided the setting as to which side of the boundary line between plaintiffs' success or failure the jury could accept. It was reversible error to have excluded testimony as to everything that happened in relation to the attempt to influence a witness.

The events that transpired clearly tainted the information supplied to the jury, and a refusal to grant a mistrial deprived the petitioners of their right to a trial in accordance with the requirements of due process of law. The right was additionally denied when the Court refused to permit the jury to hear the testimony of the witnesses concerning the tampering incident. Such testimony before the Court alone deprived the petitioners of their right to have the jury determine whether there was in fact tampering, or an attempt to tamper, or whether in any event the conduct of the respondents was such from which one could draw the conclusion that the respondents recognized their guilt and responsibility for what occurred.

Finally, in preventing all of this relevant information from being considered by the jury, a substantial portion of plaintiffs' right to a trial by jury was destroyed. Petitioners no longer had a full trial of their grievances before the jury as provided for by the Constitution.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted to review the events complained of and the determination of the Court below.

Dated: Middletown, New York
December 1, 1982

Respectfully submitted,

MICHAEL M. PLATZMAN
Attorney for Petitioners

APPENDIX A.

Summary of Trial Testimony Presented by Petitioners.

The petitioner, Diane Monaco, entered the Horton Memorial Hospital on July 15, 1974, at 3:30 a.m. The infant plaintiff, Frankie Monaco, was ultimately delivered by cesarean section at 1:44 p.m. on the same date. Dr. Ira Rubenstein, Dr. Fred Levinson, and Dr. Fred Feiner were the obstetricians who participated in the prenatal care and the delivery. Defendant Rohatgi administered DPT vaccinations to the infant plaintiff on September 14, October 14, and November 14, 1974. After the third DPT vaccination, the infant developed seizures and encephalopathy, and became blind. He was later treated for these problems by Dr. Arnold Gold at Columbia Presbyterian Medical Center.

Petitioners alleged, and the testimony showed, that the infant became blind and suffered seizures in part as a result of a contraindicated third injection of DPT vaccine. The injection was contraindicated because of the presence of a prolonged high fever after each of the first two injections, and because of the presence of colic and an inward deviation of one eye after the second injection. The infant also sustained brain damage because the defendant obstetricians performed a contraindicated amniotomy and unduly delayed the performance of a cesarean section in light of the presence of cephalopelvic disproportion, failure of the infant to progress down the birth canal, the presence of meconium fluid, and dramatic changes in the fetal heart beat rate. This caused hypoxia which contributed to the brain damage.

Dr. Ira Rubenstein, an obstetrician-gynecologist since 1973 (R. 97, 98), first saw the petitioner Diane Monaco at the hospital when she entered at about 3:30 a.m. on July

15 (R. 105). He saw Mrs. Monaco again at 5:00 a.m., and at 6:30 a.m. (R. 110, 111), when he performed an amniotomy, i. e., a rupture of her membranes. He left the hospital at 8:00 a.m. (R. 161). He could not tell if Mrs. Monaco was in active labor (R. 106), although Dr. Feiner, who delivered the infant, reported that Mrs. Monaco was admitted to the hospital in active labor (R. 106, 119, 120). Dr. Rubinstein admitted that Mrs. Monaco entered the hospital with an unfavorable cervix (R. 121, 123); that it was "extremely important" to monitor such a patient at regular intervals (R. 126); that the fetal heart rate had to be recorded every fifteen minutes for patients in active labor (R. 127, 139, 140), but that the fetal heart rate in this case was not recorded every fifteen minutes and that there were gaps of up to one hour (R. 130, 132).

Dr. Rubenstein testified that meconium fluid (green-tinged fluid) was recorded in the hospital record at 7:00 a.m. and again at 11:00 a.m. He also pointed out that the fetal heart rate was 160 at 6:30 a.m., when the amniotomy was performed, and thereafter dropped to 124 at 7:00 a.m. (R. 167, 168).

Dr. Levinson, an obstetrician-gynecologist associated with Dr. Rubenstein and Dr. Feiner, testified that he also saw Mrs. Monaco during the morning of July 15th. At the trial, he testified that he first attended Mrs. Monaco at 8:00 a.m., although at his examination before trial on February 2, 1977, he testified that he first saw Mrs. Monaco at 9:50 or 10:00 a.m. (R. 294, 295), and left the hospital when Mrs. Monaco went in for surgery at about 1:00 p.m. (R. 303). Regardless of what time he actually arrived, he testified that he was responsible for Mrs. Monaco's care starting at 8:00 a.m. (R. 298).

Dr. Levinson knew that meconium staining was noted in the hospital record at 10:00 a.m. and at 11:00 a.m. (R. 310, 311). He conceded that the infant's fetal heart had to

be monitored at least every fifteen minutes (R. 318). He testified that there was a failure of the infant to progress down the birth canal from 3:30 a.m. to 10:00 a.m. (R. 331, 332), and that cephalopelvic disproportion existed since 6:30 a.m. (R. 340).

Mrs. Dembeck, a nurse, testified in a deposition that was read, that she was on duty from 7:00 a.m. to 3:00 p.m. on July 15, and that when the fetal heart rate was taken, it was immediately recorded in the hospital record (R. 490, 491).

Dr. Feiner, another obstetrician-gynecologist, testified that he delivered the infant plaintiff by Cesarean section at about 1:44 p.m., and that the Cesarean was performed because of cephalopelvic disproportion (CPD) and failure to progress in either cervical dilatation or descent of the fetal vertex (head) (R. 500, 502).

Dr. Feiner admitted that progress is an important guide in making a diagnosis of CPD, and that it is dangerous to allow the patient to labor when CPD exists. He stated that action must be taken within two or three hours of the time when the diagnosis is made, to prevent brain damage due to cerebral bleeding (R. 505-509).

Dr. Rohatgi is a pediatrician who graduated from medical school in India and became licensed in 1971 (R. 640). He testified that the infant was born with bluish fingernails and toenails, and was given oxygen (R. 642, 643). Dr. Rohatgi attended the infant at the Cesarean and until the infant's discharge from the hospital on July 21, 1974 (R. 644).

Dr. Rohatgi first examined the infant at his office on August 2, 1974, when he did a complete physical examination, including an examination of the infant's eyes (R. 644, 664, 665). He again did a complete physical examination, and found a healthy baby with no apparent congenital defects (R. 663, 654). Dr. Rohatgi next saw the

baby on October 14, 1974, when he again diagnosed a healthy baby after performing a complete physical examination, and administered the second full-dose DPT vaccine (R. 668, 670).

Dr. Rohatgi next saw the infant on November 14, when Mrs. Monaco told him that the infant was crying excessively and continuously for three or four hours in the evening hours after feeding (R. 670, 674). He diagnosed this condition as colic (R. 670, 672) and prescribed Pamine drops (R. 675). Dr. Rohatgi admitted that it was important to know how many colic attacks the baby had, but that he did not bother to elicit this information (R. 674).

Dr. Rohatgi testified that colic is a condition in which the baby has abdominal pains, rolls up his thighs or legs over his abdomen, and cries continuously even though the mother tries to pacify the infant. The legs also become stiff (R. 676). He made no record as to how many colic attacks the infant had, or how long they existed (R. 693). He did not record the infant's temperature on August 2, September 14, October 14, or November 14, even though he recorded it on December 2 when it was found to be normal (R. 696, 699). He made no record of the medications he prescribed, the amount prescribed, or the length of time that the medications were to be taken (R. 700).

He admitted, however, that on September 14, he told Mrs. Monaco to give the infant aspirin for fever (R. 703). He also admitted that DPT can cause serious side effects, including convulsions and encephalitis (inflammation of the brain) (R. 708, 710, 711), but that he told Mrs. Monaco only that the baby may have fever or may be cranky, and may not sleep well the night the injection was given, but that the baby should be all right after that (R. 725).

Dr. Rohatgi diagnosed blindness on February 6, 1975, and felt the blindness was due to a "degenerative

disorder" of the central nervous system (R. 736). He said that the diagnosis of a post-pertussis encephalitis is made clinically by the presence of convulsions (which the infant had) and stupor or coma (R. 773); that there were tests available to rule out this diagnosis, but that he never performed those tests (R. 774).

At his examination before trial, Dr. Rohatgi testified that DPT is contraindicated when the infant has a febrile reaction, a fever, or is sick (R. 777). He later changed his answer to read "any febrile reaction to injections or any febrile illness. If the infant has a fever or is sick" (R. 778). He explained that "fever" meant a temperature of 100 degrees Fahrenheit; that an infant with colic was sick (R. 682).

The infant's mother, Diane Monaco, testified that she saw Rohatgi on August 2, 1974, and told him that the infant cried a lot (R. 933, 934). She next saw Dr. Rohatgi on September 14, when Dr. Rohatgi prescribed Pamine drops (R. 937), because the infant continued to cry excessively (R. 935).

Dr. Rohatgi never told Mrs. Monaco about the risks and hazards of the DPT vaccine (R. 942, 943).

After the first DPT vaccination, Mrs. Monaco felt that the baby was feverish and flushed, and he was crying. She took the infant's temperature and recorded it as 101 degrees Fahrenheit. She called Dr. Rohatgi and told him about the fever and he prescribed Tylenol. Even with the medication, the fever lasted about nine hours (R. 943, 945).

After the second vaccination on October 14, the infant manifested a fever of 102, 103 degrees Fahrenheit. Mrs. Monaco again called Rohatgi who again prescribed Tylenol (R. 953, 954). Additionally, the infant's right eye turned inward (R. 954).

After the third injection, the infant developed a high fever for about three days. The site of the injection was swollen and bleeding for which Dr. Rohatgi ordered an ice pack. Mrs. Monaco called Rohatgi every day from November 14 until the next visit on December 2, regarding the infant's condition (R. 958, 959).

Mrs. Monaco, the infant's mother, also told Dr. Rohatgi that the eye turned inward after the second, and before the third vaccination (R. 1111, 1112).

Before the defendant tampered with the testimony of Dr. Sherman, the latter testified that the first obstetrical danger sign occurred when Mrs. Monaco entered the hospital and the baby's head was not engaged in the pelvis. Under normal circumstances, the infant's head should have descended into the pelvis by the time Mrs. Monaco entered the hospital. This was probably due to the fact that the infant's head was facing the wrong direction (R. 1133), which should alert the attending physician to a high chance of cephalopelvic disproportion (R. 1134).

Dr. Sherman also testified that it was a departure from accepted practice for Dr. Ira Rubenstein to perform an amniotomy at 7:00 a.m., because the fetal vertex had not engaged in the pelvis (R. 1135). This allows the umbilical cord to prolapse and become compressed, which reduced the flow of oxygenated blood to the fetus and produces ischemia and fetal distress. The cardinal signs of fetal distress are a sudden abrupt drop of the fetal heart rate, as occurred in this case from 160 to 124 beats per minute a half hour later, and/or meconium staining, which was noted several times (R. 1135, 1137).

Fetal distress is an indication of intrauterine fetal hypoxia and ischemia and is an indication for immediate termination of pregnancy (R. 1139).

Dr. Sherman also testified that it was a departure from accepted practice to fail to do a Cesarean section to deliver

the infant at 7:00 a.m., or as soon thereafter as possible (R. 1141). He also testified that it was a departure from accepted practice not to use a fetal monitor to obtain continuous readings of the fetal heart beat, which would reveal significant changes in the baby's condition (R. 1143).

After Dr. Feiner and his attorney tampered with Dr. Sherman's testimony, Dr. Sherman repeatedly qualified his testimony and diluted the effect of it by stating that he was not speaking for the "standards of the other physicians at University Hospital" (R. 1326, 1335, 1336). Attorney Ryan repeatedly sought these responses by asking what Dr. Sherman "learned about the practices of other doctors" at University Hospital and what the practice was of the Director of Obstetrics at University Hospital (R. 1326, 1327, 1377, 1378). The Court, over objection, allowed Dr. Sherman to answer questions about the practice of the Director of Obstetrics (R. 1328). He said that failure to perform a Cesarean section after 7:20 or 7:30 did not cause the fetal distress. He stated that, in his opinion, it had already occurred. He also agreed with counsel on cross-examination that the failure to use a fetal monitor did not cause the distress which he says had already occurred and that there was no evidence of fetal distress at the time of delivery. There were other modifications of his testimony following the defendants' obviously successful efforts to modify what he had testified to.

Dr. Green, a pediatrician, testified that the third full dose of DPT vaccine should not have been given, or, alternatively, that the pertussis vaccine should have been omitted from the vaccination (R. 1479).

Dr. Green further testified that the infant had a reaction to the pertussis vaccine which caused convulsions and blindness (R. 1489), and that the blindness was not congenital (R. 1580, 1581, 1584).

The main risk of DPT vaccine in 1974 was encephalitis (an inflammation of the brain) due to the whooping cough (pertussis) element of the vaccine. A reasonably prudent person would have advised the patient of these risks (R. 1497, 1498).

Dr. Shapiro, a neurologist, testified that the infant's seizures were due to hypoxia suffered before the delivery and encephalitis from the DPT vaccinations (R. 1620). There was fetal distress as shown by meconium-stained fluid (R. 1640). Furthermore, the fetal distress occurred from the time the membranes were ruptured when the amniotomy was performed, to the time of delivery (R. 1656).

APPENDIX B.

Order of Appellate Division—Second Department, Dated March 29, 1982.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 29, 1982.

Hon. Lawrence J. Bracken, Justice Presiding,
Hon. Richard A. Brown,
Hon. James F. Niehoff,
Hon. Isaac Rubin,
Associate Justices.

FRANK ANGELO MONACO, etc., *et al.*,

Appellants,

v.

FREDERICK S. FEINER *et al.*,

Respondents;

et al.,

Defendants.

In the above entitled cause, the above named Frank Angelo Monaco, etc., *et al.*, plaintiffs, having appealed to this court from a judgment of the Supreme Court, Orange County, entered July 23, 1979; and the said appeal having been argued by Michael M. Platzman, Esq., of counsel for the appellants, argued by Lawrence T. D'Aloise, Jr., Esq., of counsel for the respondents Frederick E. Feiner, Alan L. Rubenstein, Ira S. Rubenstein and Fred S. Levinson, Individually and as Co-partners, and Middletown OBS-GYN Associates, P. C., argued by Bruce G. Habian, Esq., of counsel for the respondent Rohatgi and argued by Michael A. Hayes, Jr., Esq., of counsel for the respondent Elizabeth A. Horton Memorial Hospital, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, without costs or disbursements.

Enter:

IRVING N. SELKIN

APPENDIX C.

Order of the New York State Court of Appeals, Dated October 19, 1982.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October A. D. 1982.

Present, Hon. Lawrence H. Cooke, Chief Judge, presiding.

2 Mo. No. 800

FRANK ANGELO MONACO, an infant &c., *et al.*,

Appellants,

vs.

FREDERICK S. FEINER & ors., individually and as copartners in the firm of "John Doe," a partnership, *et al.*,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA
Clerk of the Court

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

82-1168

No.

IN THE

Supreme Court of the United States

October Term, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE," a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Supplement to Petition for a Writ of Certiorari

MICHAEL M. PLATZMAN
Attorney for Petitioners
40 Grove Street, P. O. Box 329
Middletown, NY 10940
(914) 343-4281

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, Frank Anthony Monaco, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "John Doe," a partnership, said name "John Doe" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P. C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Supplement to Petition for a Writ of Certiorari.

The petitioners recognize that the granting of a writ of certiorari usually requires more than the commission of errors by the courts below. The issues involved must concern themselves with matters of great public importance. It is urged that this is just that type of a case. It concerns itself with the very foundations of our judicial system—a fair trial.

What has been happening in the field of medical malpractice is almost unbelievable, in that the medical profession has considered itself beyond the reach of the normal principles of law. There is a conspiracy of silence among the physicians of organized medicine. They will not permit their members to testify against other members, no matter how compelling and truthful such testimony would be. The physician expects that every other member of society must refrain from violating the law with respect to tort or contract, but will loudly shout "traitor" if the violation is directed against a physician and agreed to by another physician. In most instances, expert medical testimony is still required to obtain relief. As a result, such relief from misfeasance by a doctor becomes very difficult because expert testimony is not available.

In the present case, the respondents have stooped to the extreme by promptly punishing the testifying physician during the course of the trial itself and exerting the kind of pressure that is frightening to the physician who was testifying. They called his superior, Dr. Robert Morris. They were belligerent in their condemnation of him in using "poor judgment." They said they would report him to the Chairman of the Department. They said that all of this "hung two doctors and was going to cost them a boodle." He was called a "son of a bitch." There were two other "undisclosed doctors" who were also spoken to, etc. There was nothing subtle about their pressure.

It is no wonder that the truth can be bottled up, stifled and stamped upon. No doctor dare testify to the truth without assuming the risks of being punished.

The subject is one of general concern. Almost daily, something appears in the public eye that stirs our recognition that the judicial system is being constantly obstructed when it applies to the medical profession. Sunday, Jan. 9, it was discussed in the television program "Sixty Minutes." Scores of articles appear in magazines, columns in newspapers, programs on radio and TV. All add up to creating the concept that the medical profession must be considered separate and apart from the rest of us. Organized medicine has had special legislation passed to help the physician in this campaign. The atmosphere is such that one gets the impression that there would be no malpractice cases except for the courts, the judicial system, and the lawyers who seek to enforce them.

The errors in this case are more than just errors of law. They deprived petitioners of a fair trial. They shake the very foundations of a truly just judicial system which should permit a witness to testify as to the truth without worrying that the next day he will be punished; that he will lose his job; that he will be disgraced before his peers as a traitor; that he will find future activities in his profession more difficult. To climax all of this, the jury is shielded from knowing all of the events.

The true administration of justice means more than correcting errors. Justice must be beyond reproach. But even more important, it must be beyond suspicion. We are concerned as much with the integrity of our legal system as the accuracy of its results. In this case, the opportunity exists

to at least, wherever possible, make it clear that the conduct complained of cannot be tolerated with impunity. It will be challenged and stopped.

The writ of certiorari should be granted.

Dated: Middletown, New York
January 24, 1983

Respectfully submitted,

MICHAEL M. PLATZMAN
Attorney for Petitioners

82-1168

No.

Office-Supreme Court, U.S.
FILED
FEB 7 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE," a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Brief of Respondents Frederick S. Feiner, Alan L. Rubenstein, Ira S. Rubenstein, Fred S. Levinson, Individually and as Co-Partners, and Middletown OBS-GYN Associates, P.C., in Opposition to Petitioners' Petition for a Writ of Certiorari

CLARK, GAGLIARDI & MILLER, P.C.
Attorneys for Defendants-Respondents Frederick S. Feiner, Alan L. Rubenstein, Ira S. Rubenstein, Fred S. Levinson, Individually and as Co-Partners, and Middletown OBS-GYN Associates, P.C.
The Inns of Court, 99 Court Street
White Plains, NY 10601
(914) 946-8900

Of Counsel
LAWRENCE T. D'ALOISE, Jr.

Questions Presented.

1. Is it tampering to verify the factual testimony of the opposing party's expert concerning his credentials?

2. Is it a violation of due process of law when the Trial Court denied plaintiffs' motion for a mistrial and application that the alleged tampering be brought before the jury after a full hearing wherein it found that the efforts of the defense were merely to check the credentials of the plaintiffs' expert obstetrician who lied about his credentials in his testimony?

3. Does the allegation of violation of due process based upon a claim of tampering with a witness which was found by the trial judge to have no basis, which determination was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department with leave to further appeal denied by the New York State Court of Appeals, raise a substantial federal question such that review by this Court is merited?

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TABLE OF AUTHORITIES.

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OTHER AUTHORITIES:

New York Penal Code §215.10 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, Frank Anthony Monaco, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "John Doe," a partnership, said name "John Doe" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P. C.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Brief of Respondents, Frederick S. Feiner, Alan L. Rubenstein, Ira S. Rubenstein, Fred S. Levinson, Individually and as Co-Partners, and Middletown OBS-GYN Associates, P.C., in Opposition to Petitioners' Petition for a Writ of Certiorari.

Statement of the Case.

In this medical malpractice action the plaintiffs claim that the infant, Frank Monaco, was injured as a result of the negligence of the defendant obstetricians, Feiner, A. Rubenstein, I. Rubenstein and Levinson, in a pre-delivery obstetrical care rendered to the infant's mother, and that the pediatrician, defendant Rohatgi, was negligent in his pediatric care of the infant. The trial of the action took over two months. During the trial, expert testimony was presented on behalf of both the plaintiffs and the defendants with regard to the quality of the obstetrical and pediatric care. Of great significance is that the infant's treating physicians, Dr. Lester Mermell, an ophthalmologist, and Dr. Myles Behrens, a neuro-ophthalmologist, both testified that plaintiff's blindness was caused by a congenital malformation of the optic nerves which occurred during the first several months of pregnancy (2321, 2330, 2354-55, 2356, 2391-93, 2401-04, 2422).[1] Dr. Arnold Gold, who treated the infant at Columbia Presbyterian Hospital, diagnosed the baby as having a congenital defect (2229, 2392, 2401-02). Dr. Joseph Schnur, a neuro-radiologist, confirmed that the defect was congenital from CAT scans that were taken of the baby at Columbia Presbyterian (2460).

During the trial, the Court dismissed the obstetrical claims except for those against defendant, Ira Rubenstein,

[1]References are to the transcript of the trial.

which were submitted to the jury along with the claims against the pediatricians. The jury returned a unanimous verdict in favor of the remaining defendants.

The determination was appealed to the Appellate Division of the Supreme Court, Second Judicial Department. That Court affirmed the judgment of the Court below without opinion. Plaintiffs' motion to the Appellate Division for renewal and for leave to appeal to the New York State Court of Appeals was denied. Plaintiffs' motion to the Court of Appeals for leave to appeal to that Court was also denied.

Summary of Argument.

During the course of the trial of the subject case, petitioners presented an expert witness who testified as to his credentials and to the merits of the case. Respondents investigated the witness' stated credentials, and found that he had made several untrue statements, a fact which he admitted on later cross examination. Petitioners have attempted to characterize respondent's investigation of their witness as tampering in order to offset damage done by the unmasking of their expert, but in fact neither the Trial Court nor the Appellate Courts of New York found any evidence of impropriety by respondents.

Petitoners' present application for certiorari speaks of this alleged tampering as if it were accomplished fact in order to reach a spurious constitutional ground for certiorari. The issue herein is not one of constitutional import, but rather goes to whether an evidentiary question was correctly decided. Because there is no federal question here, a grant of certiorari would be inappropriate.

In addition, there is no special and important reason for certiorari here. There is no issue of national scope, no result in conflict with this or other courts, no federal question ripe for resolution. There is no evidence to show impropriety in the lower Court's determination. There is no basis for a grant of certiorari in this case.

POINT I.

There was no tampering in this case.

The petitioners' application for certiorari to this Court is based upon the *assumption* that there was tampering with their obstetrical expert, Dr. Sherman. There was no tampering with this witness. The simple truth is that this expert witness lied about his credentials, and was caught when the credentials were checked out by the defense. Yet, the plaintiffs have the temerity to continue to contend that the defense efforts to ascertain the real truth concerning this witness constitutes tampering, notwithstanding that neither the Trial Court nor the Appellate Division of the Supreme Court of the State of New York found any basis for the claim.

Dr. Sherman was plaintiffs' principal obstetrical expert against the defendant obstetricians. His credentials were thus of significant importance. On direct examination, Dr. Sherman testified that he was presently teaching on the teaching faculty of the New York University School of Medicine and had been teaching obstetrics and gynecology since 1964:

> "QUESTION: Doctor, are you on a teaching faculty?
>
> ANSWER: Yes, sir. I am on the faculty of New York University School of Medicine.

QUESTION: And you have been connected on the faculty for how long now?

ANSWER: Since 1964.

QUESTION: And your subject matter in connection with that teaching is what?

ANSWER: Obstetrics and gynecology" (1127).

On cross, Dr. Sherman again testified regarding his teaching position at the Hospital:

"QUESTION: Doctor, you testified this morning, I believe, that you are on the teaching staff of New York University Hospital; is that correct?

ANSWER: That's correct" (1151).

In addition, on cross Dr. Sherman testified that he participated in approximately 100 obstetrical deliveries on his own patients during the year 1954:

"QUESTION: You have done deliveries; correct?

ANSWER: That's correct.

QUESTION: How many deliveries did you do last year, the year 1978?

ANSWER: I don't have my records with me.

QUESTION: Well, how about approximately?

ANSWER: 100.

QUESTION: Are they your own patients, doctor, or are they service patients?

ANSWER: They are my own patients" (1154).

Further, Dr. Sherman testified that the teaching staff at the University Hospital would have done things differently than did the defendant obstetricians:

"QUESTION: Are you saying that that is the opinion of the teaching staff of University Hospital to do an immediate section under those circumstances you saw at 7:00?

ANSWER: I would say, yes" (1156-1157).[2]

During cross examination, plaintiffs' counsel moved for a mistrial on the grounds that the defense had contacted University Hospital in connection with Dr. Sherman's testimony. The trial was suspended and a hearing was held in chambers, during which testimony was taken from Drs. Sherman and Feiner in connection with the claim. The substance of what transpired is as follows.

Defense counsel Ryan advised the Court that during Dr. Sherman's testimony he had telephoned Dr. Morris, the Assistant Chief of Obstetrics and Gynecology at University Hospital,to inquire into Dr. Sherman's qualifications and credibility, as the Directory of Medical Services listed Dr. Sherman as last teaching in 1964. Dr. Morris advised Mr. Ryan that Dr. Sherman did not have a teaching position (1241-42).

Dr. Sherman's credibility was now seriously in doubt. Dr. Feiner testified that he spoke to two University Hospital staff physicians whom he knew to ascertain the truth of Dr. Sherman's testimony. Principally, Dr. Feiner was interested in Dr. Sherman's testimony that he held a teaching position at the Hospital and had performed 100 deliveries in the prior year. Dr. Feiner ascertained from their doctors that the most deliveries Dr. Sherman could have performed during the prior year was 20 to 30. They suggested that Dr. Feiner call Dr. Morris who could give

[2]It was Dr. Sherman's opinion that the obstetrician should not have performed an amniotomy, and should have performed a Caesarean section immediately thereafter.

accurate information on a number of deliveries and Dr. Sherman's teaching position (1280-94).

Dr. Feiner did call Dr. Morris. He didn't ask Dr. Morris if he could help him (1938). He didn't ask Dr. Morris to speak to Dr. Sherman (1303, 1941). He didn't ask Dr. Morris to do anything other than to give information concerning the number of deliveries by Dr. Sherman the prior year, and the status of his teaching position (1303, 1942). In fact, Dr. Feiner did not speak to any doctors at the University Hospital to try to affect Dr. Sherman's testimony as a witness. Rather, he simply wanted to find out about the volume of Dr. Sherman's work and his teaching status (1951).

Dr. Morris checked the records and found that Dr. Sherman did not perform 100 deliveries the prior year, but closer to 20. He also told Dr. Feiner that Dr. Sherman did not have any formal teaching assignment at the Hospital (1295-97, 1301, 1939-40, 1947).

Dr. Sherman testified at the hearing that he spoke to Dr. Morris who was not critical of his opinion, but did disagree regarding his testimony as to the proper management of obstetrical patients (1261). In view of their differences of opinion, Dr. Morris cautioned Dr. Sherman that he should not represent that his opinion was that of the teaching staff of the Hospital as he had previously testified. Dr. Sherman said that while he experienced some "flack" over the matter, he was not afraid he would lose his privileges (1254-1261, 1277).

The Trial Judge found that there was absolutely no evidence that there was any effort to seek, persuade or otherwise induce the doctors at the University Hospital to

affect the testimony of Dr. Sherman (1954), that there was nothing to indicate that anyone had interceded with Dr. Morris to bring about any change in his testimony (1306), and that, while Dr. Sherman testified that he did expect some "flack," "he was prepared to proceed in accordance with whatever his testimony would otherwise have been" (1305). The Court denied the motion for a mistrial (1307) and plaintiffs' application that this matter be brought before the jury (1954).[1]

When testimony resumed before the jury, Dr. Sherman admitted that he was incorrect when he testified that he performed approximately 100 deliveries, and conceded that he actually performed 10 to 20 in the prior year (1323-1324). Although he was argumentative, he finally admitted that he had no teaching assignment at the Medical School (1334). He also admitted that it was not the teaching of the University Hospital not to do an amniotomy under the circumstances, and that at least one doctor at the Hospital would have done an amniotomy (1326-1327).

Further, there was no effect on Dr. Sherman's testimony other than his admitting the truth. He testified that he was prepared to go forward with his testimony. Notwithstanding petitioners' protestations to the contrary, Dr. Sherman steadfastly adhered to his opinion that there was malpractice in the obstetrical care (1368-71, 1377-78, 1414-16, 1434-35, 1449-50, 1457).

---

[1]We take strong issue with the petitioners' alleged quote of the Trial Court at page four of their brief that, "Disciplinary action may well be in order." There is no such statement by the Court at the cited page, nor is there any such statement in the record. This "phantom" quote is highly representative of plaintiffs' attempt at trial, before the New York Appellate Courts, and now before this Court to feign an issue of tampering which, in truth, does not exist.

It is fundamental that any witness who assumes the stand places his credibility in issue and may be impeached by evidence of any fact which is contrary to the witness' testimony. A trial, after all, is a legitimate search for the truth. The plaintiffs' witness made misstatements under oath. The defendants were entitled to delve into the factual contentions of plaintiffs' principal obstetrical witness, and to learn the truth from whatever source was appropriate. It is unthinkable that the law should intend that the credentials of a supposed expert should go unchallenged. Indeed, in *Trapp v. American Trading & Production Corp.*, 66 A.D.2d 515, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, set aside a verdict when it was discovered *after the trial* that an expert lied about his qualifications.

The cases upon which petitioners rely are not at all in point. They all involve situations where there was a direct effort to coerce a witness to either change or suppress evidence. This is not the situation in the case at bar. Nor is there relevance to §215.10 of the New York Penal Code. In point of fact, there has not nor could there be any proceeding against the respondents under this statute.

In sum, there was nothing more done in this case than in any case where a witness' credentials are suspect. The plaintiffs themselves admit in their brief that the credibility of witnesses was most important. The jury was entitled to know the truth about Dr. Sherman's credentials, and the misrepresentations he made in his initital testimony. There was no tampering in the case at bar, and thus no violation of any of petitioners' rights by reason of the Court's refusing to grant a mistrial and refusing to allow the plaintiffs to bring their claim of tampering before the jury.

POINT II.

Certiorari should be denied because the issue involves, essentially, an evidentiary ruling by the Trial Court.

The major contention of the petitioners is that the Trial Court's refusal to allow them to present their evidence of alleged tampering to the jury denied them due process of law. The fact is that the Trial Judge made an evidentiary ruling which was within his judicial discretion, and which has been affirmed by the Appellate Division of the Supreme Court of the State of New York. This Court has stated that a petition for a writ of certiorari will not be granted to review evidentiary questions (*General Talking Pictures Corp. v. Western Electro Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L. Ed. 1273 [1937]).

Compelling authority against the granting of certiorari in this case is found in *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385 (1918). There, Mr. Justice McReynolds writing for the Court stated that a writ of certiorari was improperly granted where the question raised by the petitioners was whether the Trial Court erred in refusing to submit an evidentiary question to the jury. The Court dismissed the appeal finding that, "The propriety of submitting these matters depended essentially upon an appreciation of the evidence" (*Houston Oil v. Goodrich*, 245 U.S. 440, 441, 38 S.Ct. 140, 62 L.Ed. 385 [1918]).

The same is time for the case at bar. Precedent indicates that such a question is not a proper subject for Supreme Court review. Thus, respondents respectfully submit that petitioners' petition for a writ of certiorari should be denied.

POINT III.

There is no basis for this Court exercising its discretion in favor of certiorari.

The granting of certiorari is a discretionary act. Historically, the substantial federal question must be involved in order for certiorari to be allowed. The petitioners claim that the federal question involved is one of due process and the right to a fair trial. It is not without significance that although this case has wended its way through a Trial Court, and through Appellate Courts of the State of New York, petitioners have never before contended that there has been a constitutional violation of a due process right. One naturally concludes that the due process claim has been contrived to suggest a constitutional violation which, in reality, does not exist.

Rule 17 of the Rules of this Court requires "special and important reasons." There are no such reasons in the case at bar. Indeed, none of the considerations for granting certiorari mentioned in Rule 17 are present in this matter. The determination that there was no tampering with plaintiffs' obstetrical witness does not conflict with any decisions of this Court, nor with decisions of other state courts or federal courts of appeals. There is no reason why the issue should be addressed by this Court. Indeed, there is no federal question involved but rather an evidentiary determination by the Trial Court (see Point II, *supra*).

In addition, there is no reason why this case should be addressed by this Court. The evidentiary question raised by petitioners has no national import. Rather, the evidentiary decision of the Trial Judge has significance only to the parties to this litigation.

Even if this Court were to grant certiorari in this case, there is every likelihood that the decision of the Trial Court would be sustained. The Appellate Division of the Supreme Court of the State of New York has affirmed the decision. The Court of Appeals has denied petitioners' motion for leave to appeal to that Court, impliedly determining that there are no issues warranting that Court's review. Indeed, the Trial Judge's decision is supported by the overwhelming evidence. There was no attempt to tamper or alter the witness' testimony. The defense was entitled to investigate the credentials of plaintiffs' expert witness. The jury was entitled to know the truth about Dr. Sherman's credentials, and the misrepresentations in his testimony. Petitioners' brief advances no argument to suggest that further review by this Court would net any different result.

In sum, petitioners have failed to raise a question which merits review by this Court. There is no federal question, nor any special or important reason for granting certiorari. The issue is purely an evidentiary question. It is respectfully submitted that for all of these reasons, the petition for certiorari should be denied.

CONCLUSION.

Petitioner has shown no proper basis for a grant of certiorari in this case.

Respectfully submitted,

CLARK, GAGLIARDI & MILLER, P.C.
Attorneys for Respondents Frederick S. Feiner, Alan L. Rubenstein, Ira S. Rubenstein, Fred S. Levinson, Individually and as Co-Partners, and Middletown OBS-GYN Associates, P.C.
The Inns of Court
99 Court Street
White Plains, NY 10601
(914) 946-8900

Of Counsel:
LAWRENCE T. D'ALOISE, Jr.

Office-Supreme Court, U.S.
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No. 82-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK ANGELO MONACO, an infant under the age of 14 years, by his parent and natural guardian, FRANK ANTHONY MONACO, DIANA LYNN MONACO and FRANK ANTHONY MONACO,

Petitioners,

against

FREDERICK S. FEINER, ALAN L. RUBENSTEIN, IRA RUBENSTEIN, FRED S. LEVINSON, E. RICHARD KINNE, individually and as co-partners in the firm of "JOHN DOE", a partnership, said name "JOHN DOE" being fictitious, true name unknown to Plaintiffs, and SATISH K. ROHATGI, ELIZABETH A. HORTON MEMORIAL HOSPITAL and MIDDLETOWN OBS-GYN ASSOCIATES, P.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF OF DEFENDANT-RESPONDENT, SATISH K. ROHATGI, IN OPPOSITION TO PLAINTIFFS' PETITION FOR A WRIT OF CERTIORARI

BRUCE G. HABIAN
Counsel for Defendant-Respondent, Rohatgi
MARTIN, CLEARWATER & BELL
220 East 42nd Street
New York, New York 10017
(212) 697-3122

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Questions Presented

1. Does legitimate investigation conducted by the co-defendant obstetricians and their attorney to verify factual testimony of the opposing party's expert witness and to verify the expert's credentials constitute tampering with petitioners' principal witness?

2. Did the conduct of the Trial Court in denying the plaintiffs' motion for a mistrial after conducting a full and competent hearing and investigating plaintiffs' allegations of "tampering" of this witness, constitute any violation of due process of law?

3. Given the chronology of events concerning the tampering issue, namely the realistic investigation by the Trial Court, the affirming of the defense verdict by the Appellate Division of the Supreme Court, Second Judicial Department, New York, with further leave to appeal denied by the New York State Court of Appeals, is there a substantial federal question, such that review by the Supreme Court is warranted?

Statement of the Case

Aside from the jury passing on the propriety of obstetrical and pediatric case* (which they resolved in favor of the defendants), the cause(s) of the blindness, seizures and other ophthalmological and neurological damages was either due to:

(a) As the plaintiff contended, periods of hypoxia, due to obstetrical mismanagement, resulting in a "predisposition" of the infant to increased sensitivity to the DPT vaccine, and DPT-induced encephalopathy OR,

---

* Claims against the obstetrician:
1. Cesarean section delay.
2. Fetal Heart rate not timely monitored.
3. Fetal monitor was not used.
4. Presence of fetal distress.
5. Passage of meconium.
6. Drop in fetal heart rate.

Claims against the pediatrician:
Contraindicated DPT injections in light of reactions from prior DPT injections.

(b) As the defense contended, that the diagnosis of congenital bilateral hypoplasia (lack of tissue) of the optic nerves, together with septo-optic dysplasia (absent brain tissue about the area of the optic nerves) allowed for the blindness, and related symptom complex. Such congenital conditions occurred in the first three months of fetal life when there were no criticisms of any of the defendants' conduct. All of the treating physicians, including Dr. Gold, a pediatric neurologist who treated the infant at Columbia Presbyterian Hospital, Dr. Behrens, a neuro-ophthalmologist, who treated the infant at Columbia Presbyterian Hospital and testified at the trial and Dr. Mermell, an ophthalmologist, who treated the child at Middletown, New York and testified during the trial, were of the opinion that the aforementioned deficits were congenital.

The jury adopted the reasoning of the defense.

The basis of such reasoning was well-grounded in the Columbia Presbyterian Hospital record and in the records of treating physicians, in the sophisticated aforementioned specialities. In addition, pediatric expert, Dr. Larkin, neuro-radiology expert, Dr. Schnur and pediatric neurologist, Dr. Chutorian, all postulated that the infant's deficits were of congenital origin, and unrelated to departures on the part of the treating defendants. In addition, these opinions were supported by demonstrative proof in the form of CAT scans.

The jury's verdict was appealed to the Appellate Division of the Supreme Court, Second Judicial Department. That Court affirmed the judgment of the Court below without opinion; thereafter plaintiffs' motion to the Appellate Division for renewal and for leave to appeal to the New York State Court of Appeals was denied. Plaintiffs' motion to the Court of Appeals for leave to appeal to that Court was also denied.

Summary of Argument

1. The investigation conducted by the obstetricians and their counsel Mr. Ryan does not constitute "tampering" with a witness; neither the Trial Court nor the Appellate courts of New York could unmask any evidence of improper conduct on the part of these litigants. Dr. Rohatgi and his counsel Mr. Habian, were not involved at all in this proper investigation. No proof in any degree was adduced from plaintiffs' obstetrician expert Dr. Sherman as against Dr. Rohatgi, the pediatrician.

2. There was absolutely no violation of any due process of law considering the chronology of events below as the Trial Court denied plaintiffs' motion for a mistrial in conducting a hearing to evaluate the claims made by the plaintiffs concerning the investigation conducted by the respondent obstetricians and their counsel Mr. Ryan. The issue here is not one of constitutional import, but purely an evidentiary question correctly decided by the Trial Court. Since there is no federal question involved a grant of certiorari is not warranted.

3. Notwithstanding the petitioner's comments contained in the Supplement to the Petition for the Writ of Certiorari concerning the fact that "expert testimony" is not available in medical malpractice actions and that the medical profession has considered itself beyond the reach of the normal principles of law, such arguments are spurious. There exists no reason for certiorari concerning the facts in this case. There exists no conspiracy of silence, and the discovery avenues available to all litigants allow adequate criticisms to be made of defendant-physicians, even by the parties themselves through depositions. There is not an issue here of national scope and no federal question is presented. As in every case where expert witnesses appear to discuss areas outside the general expertise of

the jury, investigation is conducted into the quantity of times that experts have testified, and prior inconsistent statements made under oath are investigated so as to have as truthful a picture as possible of what the expert is offering to the jury.

POINT I

There was no tampering with a witness in the trial proceeding below.

As indicated before, the pediatrician Dr. Rohatgi and his counsel Mr. Habian were not involved in any aspects of this proper investigation into the background of the obstertical expert Dr. Sherman. In addition, none of the testimony offered by Dr. Sherman established any areas of liability as against the pediatrician Dr. Rohatgi.

The Court properly held a hearing to establish the nature of certain telephone calls made to check into the background of Dr. Sherman. The hearing conducted by the Court analyzed the following topics:

a. Dr. Sherman's contact with his superior, Dr. Morris regarding his appearance at trial.

b. The fact that Dr. Sherman did not think that he did anything improper in testifying.

c. That there existed no rules at his affiliated hospital, University Hospital that required permission of the staff before testifying.

d. That Dr. Sherman's superior was not critical of his offered opinion.

e. That Dr. Sherman still was willing to continue this testimony (and indeed did continue his testimony).

f. That Dr. Sherman had reviewed other hospital charts for attorneys involving issues of medical malpractice.

g. That Dr. Sherman was aware that his testimony was to become part of a public record.

h. That the investigation involved research into the credibility of Dr. Sherman's claims regarding teaching responsibility and the number of deliveries he had, in fact, performed.

It became clear to the Court that these calls amounted to nothing more than an entirely proper effort by Mr. Ryan to obtain information from University Hospital pertaining to Dr. Sherman's background and experience with a view toward the cross-examination. It was also established that many of the opinions and general statements voiced by Dr. Sherman were opinions which he alone harbored. Those opinions were not, in fact, shared by Dr. Sherman's contemporaries in the Department of Obstetrics at the University Hospital.

Upon concluding the hearing, the Court was satisfied that the above-mentioned contact was innocuous and could, in no way, affect the impact of the testimony which Dr. Sherman had given. In fact, Dr. Sherman assured the Court that he was fully prepared to continue his testimony.

It is respectfully submitted that the Court below was in the best position to evaluate the totality of the circumstances; upon careful consideration of the content of the testimony elicited at the hearing, and the demeanor and the credibility of the respective participants, the Court denied the motion for a mistrial concluding: "that nothing has developed in the hearing this morning either from Dr. Sherman or Dr. Feiner . . . which indicated that anyone had interceded with Dr. Morris in order to bring about *any change* in the witness' testimony . . . there was no prima facie showing that there was an interference with the witness . . ."

POINT II

Certiorari should be denied because the issue in this case involves essentially an evidentiary ruling by the Trial Court.

The Trial Court made an evidentiary ruling, totally within its judicial discretion; such ruling was affirmed by the Appellate Division of the Supreme Court of the State of New York without opinion. It is a well-settled principle of law that a petition for a writ of certiorari will not be granted to review purely evidentiary questions (*General Talking Pictures Corp.* v. *Western Electric Co., et al.*, 304 U.S. 175, 58 S.Ct. 849 82 L Ed. 1273, [1973].

POINT III

There is no substantial federal question so as to allow this court to exercise its discretion in granting certiorari.

Throughout the appeal proceedings below after the verdict in favor of defendants, the plaintiff-appellants concentrated their arguments on the tampering issue, on a criticism of the charge given by the Trial Judge, and on the form of particular questions asked by counsel for the defendants of witnesses in the case. *Never* has a claim of constitutional violation of a due process right been brought before the Appellate courts below. There has never been a federal question involved in the proceedings in the Trial Court and there does not exist a federal question now, merely by reason of the fact that the petitioners have exhausted all of their remedies below. The lower courts, including the Appellate Division and the Court of Appeals, have agreed with the Trial Court's rulings.

Essentially, there is overwhelming evidence to support the verdict for the defendants by reason of general medical

principles, concessions made by the plaintiffs' expert witnesses on cross-examinations, medical records maintained by the treating physicians previously mentioned, and the medical records of the major treating institution, Columbia Presbyterian Hospital, which listed the infant's deficits in this case as purely congenital, namely the sophisticated diseases of congenital bilateral hypoplasia of the optic nerves and septo-optic dysplasia.

Given the substance of the trial record, the basis for the defense, the lack of improper conduct on the part of the obstetricians or their counsel, the lack of involvement of Dr. Rohatgi and his counsel in the issue before this Court, namely the so-called tampering issue, the lack of federal question or any special or important reason for granting certiorari considering that the issue is purely an evidentiary one, the petition for certiorari should be denied.

CONCLUSION

There exists no proper basis for a grant of certiorari in this case.

Respectfully submitted,

Bruce G. Habin
Counsel for Defendant-Respondent, Rohatgi
Martin, Clearwater & Bell
220 East 42nd Street
New York, New York 10017